Supreme Court, U.S.
FILED

001752 MAR 8 2001

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

JAMES E. BROWN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

---

PETITION FOR WRIT OF CERTIORARI

James E. Brown
1400 Pellican Point
Madison, TN 37115-6515
Telephone: (615) 868-6527

Petitioner, pro se

---

34 pp

QUESTIONS PRESENTED

Whether the Court of Federal Claims may ignore its own precedents and controlling decisions of this Court in ruling on the jurisdictional value of a statutory Notice of Deficiency which is invalid on its face.

Whether a Rule 60(b) motion filed within the period allotted for appeal after a defendant admits that it has used a "bogus and not bona fide," i.e., fraudulent, document to deprive one court of its jurisdiction and invoke the jurisdiction of another is timely under Rule 60(b)(6).

Whether Congress has provided exceptions to the limitations period and jurisdictional mandate of 26 U.S.C. §§ 6532(b), 6404(e), 6602, 7405, 7422(e) and 26 C.F.R. § 301.6532-2 so as to allow the Tax Court to extend its jurisdiction to claims governed by 28 U.S.C. §§ 1331, 1346(a)(1) and proceedings to recover alleged erroneous refunds and enter differing judgments under the Internal Revenue Code ("IRC") on basis of the taxpayer's state of residence.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PRELIMINARY STATEMENT	1
OPINIONS BELOW	2
JURISDICTION	2
REGULATORY PROVISION INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	14
CONCLUSION	20

TABLE OF AUTHORITIES

Cases	Page
Ackermann v. *United States*, 340 U.S. 193 (1950)	17
Aerolineas Argentinas v. *United States*, 77 F.3d 1564 (Fed. Cir. 1996)	11
Army & Air Force Exchange Service v. *Sheehan*, 456 U.S. 728 (1982)	14
Brown v. *Commissioner*, 74 T.C.M. (CCH) 1449 (1997)	13

TABLE OF AUTHORITIES — Continued

Brown v. *Commissioner*,
181 F.3d 99 (1984) _____ 13

Brown v. *United States*,
95 F.3d 1165 (1996) _____ 11

Brown v. *United States*,
5 Cl. Ct. 1 (1984) _____ 13

Calderon v. *Thompson*,
523 U.S. 538 (1998) _____ 16

Chambers v. *NASCO, Inc.*,
501 U.S. 32 (1998) _____ 16

Christianson v. *Colt Indus.Operating Corp.*,
486 U.S. 800 (1988) _____ 14

Garner v. *Louisiana*,
368 U.S. 157 (1961) _____ 15

Great Northern R. Co. v. *Sunburst Oil & Refining Co*,
287 U.S. 358 (1932) _____ 15

Hazel-Atlas Co. v. *Hartford Empire Co.*,
322 U.S. 238 (1944) _____ 16

Holof v. *Commissioner*,
872 F.2d 50 (3d Cir. 1989) _____ 18

TABLE OF AUTHORITIES — Continued

Kellogg v. United States,
165 Cl. Ct. 452 (1964) _____ 8

Keystone Driller Co. v. General Excavator Co.,
290 U.S. 240 (1933) _____ 16, 17, 19

Lehigh Min. & Mfg. Co. v. Kelly,
160 U.S. 327 (1895) _____ 16

Liljeberg v. Health Services Acquisition Corp.,
523 U.S. 538 (1998) _____ 17

O'Gilvie v. United States,
519 U.S. 79 (1996) _____ 12

Pesch v. Commissioner,
78 T.C. 100 (1982) _____ 18

Raleigh & Gaston R. Co. v. Reid,
13 Wall 269 (1872) _____ 12

Richardson v. Morris,
409 U.S. 464 (1973) _____ 14

Riverdale Cotton Mills v. Alabama & Georgia Mfg. Co.,
198 U.S. 188 (1905) _____ 16

Robinson v. United States,
920 F.2d 1157 (3d Cir. 1990) _____ 18

TABLE OF AUTHORITIES — Continued

Stanley v. *United States*,
140 F.3d 1023 (Fed. Cir. 1996) _____ 19

United States v. *Burke*,
505 U.S. 229 (1992) _____ 6, 19

United States v. *Dalm*,
494 U.S. 596 (1990) _____ 14

United States v. *Estate of Donnelly*,
397 U.S. 286 (1970) _____ 2, 13

United States v. *Wickersham*,
201 U.S. 390 (1906) _____ 11

United States v. *Wurtz*,
303 U.S. 414 (1938) _____ 12

United States v. *Testan*,
424 U.S. 392 (1976) _____ 11

United States v. *Young*,
79-2 U.S.T.C. (CCH) 9609 (1979) _____ 12, 15

United States v. *Zolla*,
724 F.2d 808 (9th Cir. 1984) _____ 18

TABLE OF AUTHORITIES — Continued

Statutes

5 U.S.C. § 5596	4
5 U.S.C. § 5596(b)(1)	11
26 U.S.C. § 104(a)(2)	5, 19
26 U.S.C. § 6213(b)(2)	1, 18
26 U.S.C. § 6213(c)	8
26 U.S.C. § 6404(e)(2)	13, 18
26 U.S.C. § 6501(a)	2, 7, 8
26 U.S.C. § 6532(b)	passim
26 U.S.C. § 6602	18
26 U.S.C. § 7405	passim
26 U.S.C. § 7422(a)	8, 9
26 U.S.C. § 7422(e)	passim
26 U.S.C. § 7442	1, 2, 8
26 U.S.C. § 7459(e)	1
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1346(a)(1)	1

TABLE OF AUTHORITIES — Continued

28 U.S.C. § 1346(a)(2) _____ 1

28 U.S.C. § 1331 _____ 1

28 U.S.C. § 1491 _____ 1, 1i

42 U.S.C. § 2000e-5g _____ 4

Constitutional Provisions:

U.S. Const. Amend. V (Equal Protection, Takings and Due process Clause) _____ passim

Miscellaneous:

Fed.R.Civ.P., Rule 60(b) _____ passim

Fed.Rules Evid. Rule 801(d)(1)(B) _____ 12

Fed.Rules Evid. Rule 803(8)(c) _____ 12

5 C.F.R. § 550.801 et. seq. _____ 4

26 C.F.R. § 301.6532-2 _____ passim

PRELIMINARY STATEMENT

Petitioner, James E. Brown, hereby respectfully prays that a writ of certiorari issue to review the decision of the U.S. Court of Appeals for the Federal Circuit. Alternatively, petitioner prays for summary reversal of the judgment below on grounds that the judgment is in clear contravention of law, the Constitution and controlling legal precedents of this Court.

In this case, the Court of Federal Claims ("CFC") held that pursuant to 7422(e), the filing of a protective petition in the Tax Court to protest a fraudulent and untimely notice of deficiency deprived it of its Tucker Act jurisdiction, 28 U.S.C. § 1491, and vested that jurisdiction in the Tax Court. In considering the CFC's judgment, the Tax Court held that under 26 U.S.C. §§ 7422(e), 7459(e) and an exception to the restrictions on assessments in the 1976 version of the Tax Code, 26 U.S.C. § 6213(b)(2) (1976), Congress allowed the court to extend its jurisdiction beyond 26 U.S.C. § 7442 to adjudicate 28 U.S.C. §§ 1331, 1346(a)(2) claims and proceedings for the recovery of erroneous refunds by the United States. The Tax Court, however, did rule from the bench that it did not have jurisdiction over Tucker Act claims (28 U.S.C. §§ 1491, 1346(a)(1)) as the CFC held in its judgment.

The statutory Notice of Deficiency upon which the CFC based its judgment was not only untimely and false in every material respect, but was intentionally deceptive in that instead of showing a credit for withholding in its tax computation, the IRS simply noted the withholding credit of $47,277.00 at the end of the Notice of Deficiency. In this case, and disregarding

the violation of 26 U.S.C. §§ 6532(b) and 7405, there was clearly no "tax deficiency" upon which the Tax Court could exercise jurisdiction. Consequently, the CFC erred as a matter of law and constitutional right in dismissing Brown's suit in favor of jurisdiction in the Tax Court. Moreover, in extending its jurisdiction beyond 26 U.S.C. § 7442 under the CFC's judgment, and in clear contravention of the Equal Protection Component of the Fifth Amendment and this Court's decision in ***United States v. Estate of Donnelly,*** 397 U.S. 286, 294-295 (1970) (*"Acts of Congress must be applied uniformly and nondiscriminatorily throughout the United States from the date of their effectiveness onward."*), the Tax Court held that *because Brown was a resident of Tennessee* he was not entitled to the benefits of the Federal Rules of Evidence in computing the limitations period under 26 U.S.C. § 6501(a).

OPINIONS BELOW

The opinion of the court of appeals, ***Brown v. United States***, No. 00-5017 (Pet. App. 1a-6a), is unpublished. The opinion of the Court of Federal Claims is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 2000 (Pet. App. 1a-6a). A timely motion for reconsideration was denied on January 4, 2001 (Pet. App. 7a). This petition for a writ of certiorari is, accordingly, filed within the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

REGULATORY PROVISION INVOLVED

Rule 60(b) of the Rules of the Court of Federal Claims (RCFC 60(b)) provides, in pertinent part:

> (b) **Mistakes, Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; Etc.**
>
> On motion and upon such terms as are just, the court may relieve a party of the party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, whether denominated intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken."

STATEMENT OF THE CASE

On October 31, 1985, the Equal Opportunity Employment Commission (EEOC) found that Brown had been subjected to unlawful retaliation for filing discrimination complaints against defendant in violation of Title VII. Following receipt of the EEOC decision, Brown moved the United States District Court for the District of Columbia for a declaration

enforcing the EEOC's decision. The District Court found that the Army was bound by the EEOC's decision and ordered the Army to comply with the EEOC's recommendations by promoting Brown from GS-8 to GM-13 retroactive to August 21, 1975. In compliance with the EEOC's decision and the District Court's order of enforcement, under dates of June 19, 21 and 23, 1989, the Army issued statutory Notice[s] of Personnel Action[s] promoting Brown from GS-8 to GM-13 retroactive to August 21, 1975. Based upon these retroactive promotions and the *mandatory "make whole"* provisions of the Back Pay Act, 5 U.S.C. § 5596, and Title VII, 42 U.S.C. § 2000e-5g, the Army determined that pursuant to 5 U.S.C. § 5596 [5 U.S.C. §§ 5332, 5334, 5402, 5403] and 5 C.F.R. §§ 550.801 et seq. that Brown was entitled to back pay in the amount of **$234,228.31**. Under date of April 4, 1990, the Army notified the court that **$138,432.55** of the **$234,228.31** due Brown had already been paid and that Brown was due an additional **$95,795.76**, if the amount was paid by May 31, 1990. Brown claimed that he had not received any of the money the Army admitted it owed him and asked the district court to order an interim payment of the principal owed as of June 23, 1989 — the date of his retroactive appointment to grade GM-13. On October 4, 1990, the district court ordered a partial payment to Brown in the amount of $137,918.96.

On November 5, 1990, more than eighteen months after his retroactive promotions, the General Accounting Office (GAO) issued Brown his first and only payment in the amount of $98,198.08. The GAO did not issue a Form W-2 or 1099 with the payment, but notified the Internal Revenue Service (IRS) in Pennsylvania, where Brown was required to file his return, of the payment in a memorandum used by the agency

for that purpose. In subsequent proceedings, in violation of the Civil Service Reform Act ("CSRA"), the Army sought a declaration from the District Court, denying Brown the benefits of the *"make whole"* provisions of Title VII and the Back Pay Act.

On June 6, 1991, Brown, as a U.S. Army employee overseas, filed his 1990 tax return with the Philadelphia, PA, district office of the IRS in accordance with IRS regulations. Per instructions from the Army and the IRS, on his 1990 tax return Brown reported the GAO's partial payment as a 26 U.S.C. § 104(a)(2) exclusion on Treasury Form 4852 (Substitute for Form W-2) and did not include it as taxable income. Prior to filing his tax return on June 6, 1991, Brown had consulted the IRS regarding the Title VII award and the non-availability of a W-2 and was instructed to request a copy of the required W-2 from its Holtsville, NY, district office. Because Brown had not filed his tax return with the Holtsville, NY, district office where he had made his request for a copy of the GAO's W-2, the NY District Office requested a copy of his June 6, 1991, return, *with an original signature.* During copying of his return for submission to the NY District Office, Brown noted a mathematical error and made pen and ink changes. On June 20, 1992, Brown provided the Holtsville, NY district office with a *corrected* copy of his June 6, 1991, return accompanied by a *sworn statement* certifying that the return was a copy of the original with pen and ink changes. Because Brown was required to file, and had filed, his original return with the IRS' Philadelphia, PA, district office he also provided the Philadelphia District Office with a copy of the *corrected* return, accompanied by a *sworn statement* certifying that the return was an amended copy of the original which had been filed on June 6, 1991. After auditing Brown's return and

finding no irregularity, the Philadelphia District Director refunded $29,612.13 of Brown's overpayment of his 1990 taxes and paid him $433.53 in interest on the excess withholding.

In early 1994, the IRS noted that Brown had not claimed a withholding of taxes in the amount $47,277.00 on his 1990 or 1991 return and initiated an audit of all of his returns. On March 8, 1994, after examining his returns, the IRS informed Brown that based on the decision of the Supreme Court in ***United States v. Burke,*** 505 U.S. 229 (1992), Title VII damages were now includable as taxable income an it proposed to tax him on his 1990 award. In addition, based on Army and district court records the IRS determined that Brown had received an additional $128,946.00 in 1991 and further concluded that the $234,228.13 the Army admitted it owed Brown was "accrued wages" on which Brown owed taxes. Brown promptly filed an administrative appeal with the IRS' certifying under oath that he had not received any money from the United States beyond that reported on his 1990 tax return and arguing that: (1) the Internal Revenue Code (IRC) did not provide for taxing him on money he had not factually received and over which he had no control; (2) the decision in ***Burke,*** supra, could not be applied retroactively to create a liability that did not exist at the time he filed his return; and (3) if ***Burke,*** supra, could lawfully and constitutionally (within the limitations of the Equal Protection Clause of the Fifth Amendment) be applied retroactively, he was entitled to an adjustment of his income for the non-taxable elements of his back pay under Chapter 59 of Title 5 and the unreimbursed litigation expenses incurred in obtaining the judgment against the Army. The IRS rejected all of Brown's contentions. Brown was subsequently advised by a government tax attorney

that the IRS' claims were barred by the statutes of limitations in 26 U.S.C. § 6501(a), 26 U.S.C. § 6532(b), 26 U.S.C. § 7405 and 26 C.F.R. § 301.6532-2. The IRS rejected Brown's arguments on grounds that he could not prove when the IRS received his original return and that the IRS was not bound by the limitations periods in 26 U.S.C. § 6532(b), 26 U.S.C. § 7405 and 26 C.F.R. § 301.6532-2. But the law is absolute.

Unable to persuade the IRS to alter its conduct which was unconstitutional and in clear violation of the IRC, on April 7, 1994, relying on the Pay Administration provisions of Chapter 55 of Title 5, the Back Pay Act, the "Takings" clause of the Fifth Amendment and the principal of "illegal exaction," Brown filed his "**Petition For Payment of Money Presently Due From The Treasury of the United States**" in the Court of Federal Claims (CFC) pursuant to the Tucker Act. As relief, Brown demanded, inter alia, payment of the money the government alleged it had already paid him; a proper computation of his back pay under the "make whole" provisions of the controlling statutes; interest on all outstanding payments; and a declaration that all claims (for and against him) with respect to his 1990 tax return were foreclosed by the IRC's limitations periods.

On May 12, 1995, before the Court Ruled on the various dispositive motions pending before it, the IRS issued the Brown a statutory Notice of Deficiency alleging that he had taxable income of **$326,308.00** in 1990 and 1991 and assessing him with a tax deficiency of **$71,212.00** on unreported income of **$230,121.00**. The notice informed Brown that he would be credited with the **$47,277** in withholding not claimed on his 1991 return, and that if he did

not sign an accompanying waiver of protest, and did not file a petition for redetermination in the U.S. Tax Court, the assessment would be final and without recourse pursuant to 26 U.S.C. § 6213(c). According to the Notice of Deficiency, Brown had been erroneously refunded **$23,935.00** for 1990 and had no deficiency for 1991 due to the unclaimed withholding in the amount of $47,277.00 for 1991. Brown declined to sign the waiver and on June 20, 1995, filed a ***protective*** petition for redetermination in the Tax Court pursuant to ***Kellogg v. United States***, 165 Cl. Ct. 452, 458 (1964), asserting that the Tax Court did not have jurisdiction over the matter and that the Notice of Deficiency was invalid based on the falsity of its assertions and the fact that it had been issued in violation of the limitations periods in 26 U.S.C. §§ 6501(a), 6532(b) and 26 C.F.R. § 301.6532-2.

On or about August 11, 1995, the United States moved the Court to dismiss Brown's petition in favor of jurisdiction over all of Brown's claims in the Tax Court pursuant to 26 U.S.C. § 7422(e). Brown opposed the United States' motion on a number of grounds, including: (1) the IRS' Notice of Deficiency was fraudulent, thus invalid; (2) the Notice of Deficiency was issued outside the limitations periods in 26 U.S.C. §§ 6501(a) and 6532(b); the Notice of Deficiency, albeit false and fraudulent, did not factually allege a deficiency so as to confer jurisdiction on the Tax Court pursuant to 26 U.S.C. § 7442; (3) since he had not requested, and could not request, a refund, the Court [of Federal Claims] did not have jurisdiction pursuant to 26 U.S.C. § 7422(a) so as to issue a valid judgment respecting 26 U.S.C. § 7422(e); (4) the Court [of Federal Claims] could not transfer Tucker Act jurisdiction to the Tax Court; and (5) the Tax Court did not have jurisdic-

tion to entertain an action to recover and alleged erroneous refund pursuant to 26 U.S.C. § 7405(b).

Brown also noted that since the United States had already conceded that the limitations periods in 26 U.S.C. §§ 6511(a) and 7422(a) denied the CFC jurisdiction to treat Brown's suit as a refund claim, the doctrine of judicial estoppel precluded reliance on IRC § 7422(e) as a basis for transferring jurisdiction to the Tax Court. Moreover, since the proceedings before the CFC were in the trial stage, even if the CFC had jurisdiction pursuant to IRC § 7422(a), Congress specifically excluded Tax Court jurisdiction on the facts and proscribed the action sought when it noted at 1954 U.S.Code Cong. and Adm. News, pp. 4579-80, that: "[s]ubsection (e) does not apply if the case in the district court or Court of Claims has already proceeded to *a hearing*, that is, to actual trial."

The CFC rejected Brown's argument, but appearing the accept the fact that the IRS' Notice of Deficiency was invalid as having been issued outside the statutes of limitations, and was otherwise invalid on its face, in granting the United States' motion to apply 26 U.S.C. § 7422(e) to the case, wrote:

> "[W]hile § 1346(a)(1) arguably grants jurisdiction over the two tax matters, this court lost jurisdiction when plaintiff filed a petition in the Tax Court on June 20, 1995, contesting the deficiencies for both 1990 and 1991.
>
> Plaintiff attempts to avoid this conclusion by arguing that the IRS failed to issue the notice of deficiency within the statute of limitations period. Plaintiff concludes that the Tax Court lacks jurisdiction and, therefore, could not oust

the Court of Federal Claim's jurisdiction. An untimely deficiency, however, will not deny the Tax Court of jurisdiction. *Columbia Bldg., Ltd. v. Commissioner,* 98 T.C. 607, 611 (1992). The Internal Revenue Code itself provides that finding a statute of limitations bar against a deficiency assessment does not deny the Tax Court of jurisdiction. Rather, such a finding is treated as a decision that there is no deficiency in respect of such tax." 26 U.S.C. § 7459(e). Thus, when a taxpayer raises this issue, the Tax Court will still address the merits of the case. Columbia, 98 T.C. at 611. (citing *Badger Materials, Inc. v. Commissioner,* 40 T.C. 1061, 1063 (1963)). Therefore, the Tax Court properly has jurisdiction.

Furthermore, the Tax Court's jurisdiction covers the entire gamut of possible issues that affect the taxpayer's liability for the particular years at issue. *Erickson v. United states, 309* F.2d 760, 767 (Ct. Cl. 1962). The notice of deficiency and plaintiff's petition to the Tax Court address plaintiff's liability for 1990 and 1991. Thus, the Tax Court has jurisdiction over plaintiff's tax liability for those years, including whether plaintiff received an additional payment of $128,946. This issue may also resolve whether plaintiff has already received the legal expenses and overseas housing allowances as a part of that additional payment. Therefore, the Tax Court has jurisdiction over these matters as well. Given the extent to which the Tax Court has acquired jurisdiction over the

> matters raised in Case No. 94-227C, this court has lost jurisdiction over all of the claims in that case. 26 U.S.C. § 7422(e)."

Brown appealed the Court's judgment to the Federal Circuit asserting, in addition to the reasons he found the Court's decision relative to 26 U.S.C. § 7422(e) erroneous, that his retroactive promotions in June, 1989, were appointments in the competitive service of the United States by direction of an "appropriate authority." 5 U.S.C. § 5596(b)(1); ***United States v. Testan,*** 424 U.S. 392, 407 (1976). Having been lawfully appointed in the Competitive Service of the United States, Brown argued that he was entitled to the pay and allowances mandated by Chapter 55 of Title 5 and the refusal, or failure, of the Army to pay him to the extent mandated by law constituted an "illegal exaction" actionable in the Court of Federal Claims. ***Aerolineas Argentinas v. United States***, 77 F.3d 1564, 1572-73 (Fed. Cir. 1996). Such pay and allowances having exceeded $10,000.00, any every claim relative to the pay mandated by Title 5 rested *exclusively* in the Court of Federal Claims. 28 U.S.C. § 1491. Here, Brown was claiming the pay and emoluments of a position to which he had been lawfully appointed. He could not be denied his statutorily mandated pay and emoluments of his position until legally disqualified and removed from federal service in accordance with law. ***United States v. Wickersham,*** 201 U.S. 390, 399-400 (1906). The Federal Circuit rejected Brown's arguments and summarily affirmed the judgment of the CFC transferring jurisdiction of all of his claims to the Tax Court pursuant to 26 U.S.C. § 7422(e). ***Brown v. United States,*** 95 F.3d 1165 (Fed Cir. 1996). Brown did not petition for review on certiorari.

Subsequently, Brown pressed his jurisdictional arguments before the Tax Court. Significantly, the IRS conceded before the Tax Court that its allegations in its statutory Notice of Deficiency were based on *"bogus and not bona fide"* documents and that Brown did not have the alleged unreported income. The Tax Court ruled from the bench that it did not have jurisdiction over Brown's Tucker Act claims and suggested that he re-file these claims in the CFC. The Tax Court further ruled, in clear and flagrant violation of 26 U.S.C. §§ 6532(b) and 7405(b), its own precedence in ***United States v. Young,*** 79-2 U.S.T.C. (CCH) 9609 (1979), and a multitude of decisions of other circuits and the Supreme Court, e.g., ***O'Gilvie et al., Minors v. United States,*** 519 U.S. 79 (1996); ***United States v. Wurts,*** 303 U.S. 414 (1938), that although the IRS' actions were proceedings to *recover an erroneous refund,* the Tax Court could extend its jurisdiction to cover the action and that the IRS was not bound by the 2-year limitations period in 26 U.S.C. §§ 6532(b), 7405(b) or 26 C.F.R. § 6532-2. The Tax Court's proposition is erroneous for a minimum of three reasons: (1) it makes the provisions of 26 U.S.C. §§ 6532(b) and 7505(a) and (b) superfluous; (2) it condones the knowing and willful violation of § 301.6532-2 of the IRS' regulations; and (3) it is at odds with long-standing and controlling decisions of the Supreme Court. One of which holds that: "[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." ***Raleigh & Gaston R. Co. v. Reid,*** 13 Wall. 269, 270 (1872). The Tax Court further held, in clear violation of the doctrine of *res judicata* and the Equal Protection Clause of the Fifth Amendment, that because Brown was a *legal resident of Tennessee*, a state within Sixth Circuit, he could not, under Federal Rules of Evidence 801(d)(1)(B), 803(8)(C) and 803(1), rely upon his sworn affidavits filed more than three

years *before* the IRS filed its claims against him or the presumption of correctness of the Philadelphia District Director's finding of timeliness as proof that he timely filed his 1990 tax return. ***Brown v. Commissioner,*** 74 T.C.M. (CCH) 1449 (1997). The United States had the Claims Court declare that Brown was *not a legal residence of Tennessee* in ***Brown v. United States***, 5 Cl. Ct. 1, at 13-15 (1984). Notwithstanding the violation of the Equal Protection Clause and the Supreme Court's admonition in ***United States v. Estate of Donnelly,*** 397 U.S. 286, 294-295 (1970) (*"Acts of Congress must be applied uniformly and nondiscriminatorily throughout the United States from the date of their effectiveness onward."*), the doctrine of *res judicata* precluded the United States from taking one position to deny Brown a benefit of his employment and then take the opposite position in order to illegally exact property from him. The Sixth Circuit affirmed the Tax Court's decision in an opinion filed April 27, 1999. ***Brown v. Commissioner,*** 181 F.3d 99 (6th Cir. 1999). The IRS now claims that it is not bound by the mandatory limitations on its authority under 26 U.S.C. §§ 6404(e)(2), 6602 and has assessed Brown with penalties and interest on the alleged erroneous refund to the extent that the IRS' claims against him now exceeds $111,000.00 — an amount which far exceeds the money factually paid Brown in damages. Clearly, Brown was the prevailing party both in his Title VII suit and the issues he raised with respect to the allegations in the Notice of Deficiency. However, instead of being made whole as required by law, he is the victim of unparalleled unconstitutional and unlawful conduct.

On June 25, 1999, relying on the IRS' admissions before the Tax Court and the Sixth Circuit that the allegations in its statutory Notice of Deficiency, which formed the basis of the

Court of Federal Claims' judgment, were false, and the Tax Court's ruling that it did not have jurisdiction over Brown's Tucker Act and Civil Service Reform Act claims, Brown filed his RCFC 60(b)(6) motion asking the court to set aside its judgment of February 22, 1996. The denial of this motion and the Federal Circuit's affirmation of that decision is the subject of this Petition.

REASONS FOR GRANTING THE PETITION

There is no question that a judgment by a court without subject matter jurisdiction is void. ***Christianson v. Colt Indus. Operating Corp.***, 486 U.S. 800, 818 (1988). Because Brown did not claim, and could not have claimed, a refund under IRC § 6511(a) in the CFC, the court lacked jurisdiction under IRC § 7422(a) and could not issue a valid decision in reliance upon IRC § 7422(e). ***United States v. Dalm***, 494 U.S. 596, 602 (1990). Further, because Brown was seeking payment of money the United States admitted it owed him, but had failed or refused to pay, and was asking for the pay and benefits of positions to which he had been lawfully appointed, all of which exceed $10,000.00, his suit was one for an *"illegal exaction"* under the Tucker Act. "The Court of Claims has ***sole [exclusive]*** jurisdiction under the Tucker Act . . . for claims greater than $10,000." ***Army & Air Force Exchange Service v. Sheehan,*** 456 U.S. 728, 734 n. 5 (1982); ***Richardson v. Morris,*** 409 U.S. 464, 465-466 (1973). There is absolutely no provision in the Courts Improvement Act, or any other statute, which would allow the CFC to vest its Tucker Act jurisdiction in the Tax Court. ***Id.*** Moreover, because the Notice of Deficiency which allegedly deprived the CFC of its jurisdiction, and conferred jurisdiction on the Tax Court, was invalid on its face, the CFC was constitutionally

bound to deny the United States' motion to dismiss. The Constitution limited the CFC's authority to dismiss Brown's action even where the court believed that the Tax Court was constitutionally obliged to follow the law and its *own precedent* in ***Young***, supra, and would rule in Brown's favor. See, e.g., ***Garner v. Louisiana***, 368 U.S. 157, 188 n. 3 (1961); ***Great Northern R. Co. v. Sunburst Oil & Refining Co.*** 287 U.S. 358, 363-364 (1932).

While the United States' admission that the allegations contained in the Notice of Deficiency it presented to the CFC for purpose of depriving it of jurisdiction were false rendered the court's judgment void for purpose of Rule 60(b), the suggestion that the admission constituted "newly discovered evidence" within contemplation of RCFC 60(b)(2) and (3) is misplaced. Under ordinary circumstances the fact that a document is fraudulent would be covered by RCFC 60(b)(2) and (3); but here the petitioner at all times knew that the document was fraudulent and so argued. He may not now be denied justice because the defendant admits its misconduct *more than one year after the judgment was entered.* The conduct at issue here falls squarely within coverage of RCFC 60(b)(6). An admission that one's evidence is fraudulent is indeed *"extraordinary"* under Rule 60(b)(6).

The very narrow question presented by this petition is whether the filing of a document which is illegal and invalid under the law authorizing its use (issued in violation of a statute and agency regulations having the force of law), and which is admitted to be inaccurate in every material aspect and based upon what the respondent terms "bogus and not bona fide" documents, i.e., fraudulent, with a federal court for purpose of defeating the jurisdiction of the court constitutes

"fraud upon the Court" and results in a "miscarriage of justice." Brown submits that it does. See ***Hazel-Atlas Co. v. Hartford Empire Co.***, 322 U.S. 238, 245 (1944). The respondent's reliance upon ***Calderon v. Thompson,*** 523 U.S. 538 (1998), to support its position is misplaced in this case. To suggest that the government may take a citizen's property in clear and uncontrovertible violation of law, then deny him due process by fraud, does not constitute *"extraordinary circumstances"* and a miscarriage of justice is unconscionable.

In affirming the CFC's decision, the court below notes that the issuance of the fraudulent notice of deficiency to Brown was *"fraud upon Mr. Brown and not upon the Court of Federal Claims."* This would be true if the notice went no further than in Brown's trash. However, the Notice of Deficiency was a statutory document, central to every action the government took, or proposed to take. Consequently, when the government introduced the "fraudulent" notice of deficiency into the proceedings before the Court of Federal Claims for purpose of defeating the jurisdiction of the court over the matter before it, the government committed "fraud upon the Court of Federal Claims." See ***Chambers v. NASCO, Inc.***, 501 U.S. 32, 44 (1991). Here, the fraud (filing of the fraudulent notice of deficiency with the court) had as its exclusive object the defeat of the jurisdiction of the court over the matter then before it. This Court has long held that such act is *"fraud upon the court"* and that such a judgment cannot stand. See ***Keystone Driller Co. v. General Excavator Co.***, 290 U.S. 240, 244-245 (1933); ***Riverdale Cotton Mills v. Alabama & Georgia Mfg. Co,*** 198 U.S. 188, 199-200 (1905); ***Lehigh Min. & Mfg. Co. v. Kelly,*** 160 U.S. 327, 339 (1895). The standard of review here is not one for abuse of discretion,

it is *de novo.* And since the facts of the fraud are not in dispute, the CFC had no discretion as to whether it would set its judgment aside as to Brown's Tucker Act claims. Concomitantly, since the injury from the fraud matured only after the decision of the Sixth Circuit foreclosed all avenues to remedy the Tucker Act fraud, Brown's return to the court whose judgment was the instrument of the injury within the time allotted for appeal was timely. Thus, on the facts of this case, Brown filed his Rule 60(b)(6) motion within a "reasonable time" after the government admitted that the statements contained in the notice of deficiency were false. ***Ackermann v. United States***, 340 U.S. 193, 197 (1950). He is, therefore, entitled to relief.

This case is a prime example of the misapplication of the principal of presumption of correctness in favor of the government. Here the respondent has not only exacted large sums of money from Brown, but has put him to extraordinary expense defending conduct which the respondent long ago knew was, and continues to be, unlawful. The respondent contended below that Brown cannot recover because the extent of his injuries from its wrongdoing does not satisfy the *"extraordinary circumstance"* requirement of RCFC 60(b)(6). Brown and this Court disagrees. The statutes at issue here are plain as to what they mandate, and as to what they proscribe. This Court made clear in ***Liljeberg v Health Services Acquisition Corp.***, 486 U.S. 847, 863-86 (1988), that the plain violation of a statute or a constitutional right will always constitute manifest injustice. The judgment below must be set aside. ***Keystone Driller Co.***, supra.

The petitioner understands the concern an Article III courts might have in reaching the merits of his claims in face of the

Tax Court's decision. However, the Constitution and precedents of this Court must be followed. Even disregarding the absurd proposition that the IRS may disregard the unambiguous commands of the law and discriminatorily apply 26 U.S.C. §§ 6532(b), 6404(e), 6602, 7405 and 26 C.F.R. § 301.6532-2, an unbiased view of the cases the IRS cites as condoning its conduct, i.e., ***Pesch v. Commissioner,*** 78 T.C. 100 (1982), reveals that the § 104(a)(2) refund and unlawful assessment of penalties and interest thereon at issue here has no relationship whatsoever to the "*quick refund*" exception to the deficiency process in the 1976 version of 26 U.S.C. § 6213(b) (1976) at issue in the cited cases.

The subject matter of this petition is an issue of public moment. The notice of deficiency is a "pivotal feature of the [Internal Revenue] Code's assessment procedures." ***Holof v. Commissioner***, 872 F.2d 50, 53 (3d Cir. 1989). It "serves as a prerequisite to a valid assessment by the IRS." ***Robinson v. United States***, 920 F. 2d 1157, 1158 (3d Cir. 1990); see also ***United States v. Zolla***, 724 F.2d 808, 810 (9th Cir. 1984) ("The IRS must send a notice of deficiency before it may assess, collect, or reduce to judgment most income tax liabilities.").

It is beyond doubt that the respondent understood its responsibilities and the limitations on its authority when it took its action against the petitioner. The statutes and regulations here involved are unambiguous, precluding a search for reasons to except therefrom. The use of a false and fraudulent notice of deficiency to deprive the CFC of its jurisdiction and invoke the jurisdiction of the Tax Court rendered the judgments void. Rule 60(b)(6) required that the judgments be set aside. ***Keystone Driller Co. v. General***

Excavator Co., 290 U.S. 240, 244-245 (1933). After all, at that time it had pending before this Court ***O'Gilvie et al., Minors v. United States,*** 519 U.S. 79 (1996), an identical case with respect to the issue of refunds issued under pre-***Burke***, interpretations of 26 U.S.C. § 104(a)(2). See also ***Stanley v. United States,*** 140 F.3d 1023 (Fed. Cir. 1998). Brown is entitled to, as a minimum, an explanation by a court of competent jurisdiction as to why the law and the Constitution has a different meaning when applied to him. The judgments below must be set aside as void; in contravention of controlling precedents of this Court; and in clear violations of the IRC, Due Process, Equal Protection component, and Takings clauses of the Fifth Amendment. The petitioner's claims must be resolved on the merits in a court of proper and competent jurisdiction.

The events giving rise to the petitioner's Rule 60(b) motion occurred more than one year after the CFC's judgment, making subsection 60(b)(6) the sole remedy for correction of the unlawful and unconstitutional judgments. Here the petitioner has been taxed on income he did not receive; taxed on money Congress has specifically excluded from taxation; and penalized in unrestrained defiance of congressional commands. Accordingly, under the circumstances of this case, Rule 60(b) imposes a non-discretionary duty to set the offending judgment aside. The alleged defiance, or clear misapplication, of the law and commands of the Constitution and precedents of this Court clearly implicate important due process and equal protection issues warranting review by this Court. Moreover, it appears that the Constitution dictates that the application for a writ in this case be granted.

CONCLUSION

For the foregoing reasons, it is concluded that the judgment below was void and, under the circumstances of this case, the petitioner's Rule 60(b)(6) petition was timely and beyond the discretion of the court to deny. Accordingly, it is respectfully asked that the petition for writ of certiorari to the United States Court of Appeals for the Federal Circuit be granted. Alternatively, petitioner asks that the judgment below be summarily set aside and the cause remanded with direction and appropriate instructions that the petitioner's claims be resolved on the merits under the Tucker Act and/or the Federal Question jurisdiction of a court of competent jurisdiction.

Respectfully submitted,

s/ James E. Brown
James E. Brown
1400 Pellican Point
Madison, TN 37115-6515
Telephone: (615) 868-6527

Petitioner, pro se

APPENDIX

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. This disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

00-5017

JAMES E. BROWN,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

DECIDED: December 5, 2000

Before RADER, BRYSON, and SCHALL, Circuit Judges.

PER CURIAM.

The United States Court of Federal Claims dismissed James E. Brown's petition to vacate the Court of Federal Claim's 1996 judgment that it lacked subject matter jurisdiction over Mr. Brown's complaint. Brown v. United States, Nos. 94-227C and 94-858C (Oct. 13, 1999) (Brown I). Because Mr. Brown has not demonstrated that the Court of Federal Claims erred in dismissing his petition, this court affirms.

Mr. Brown's prolific litigation has led to many opinions from various courts and administrative boards describing the facts of Mr. Brown's case.[3] Accordingly, this court will very briefly summarize events leading to the present appeal.

In October 1989, the United States District Court for the District of Columbia issued an order that the United States Army owed Mr. Brown back pay. Brown v. Marsh, Civ. Act. No. 80-1169 (D.D.C. Oct. 4, 1989). After receiving payment from the Army, Mr. Brown did not include the back pay as taxable income on his 1990 tax return. In March 1994, after examining Mr. Brown's 1990 return, the Internal Revenue Service (IRS) informed Mr. Brown that his back pay was includable as income for tax purposes. Additionally, the IRS found evidence suggesting Mr. Brown received $128,946 for Title Vll damages in 1991.[4] This alleged damage award was not included in Mr. Brown's 1991 tax return.

On April 7, 1994, Mr. Brown filed suit in the Court of Federal Claims seeking, inter alia, additional back pay, Title

---

[3] See, e.g., Brown v. Sec'y of the Army, 78 F.3d 645 (D.C. Cir. 1995); Brown v. United States, 741 F.2d 1374, 1377 (Fed. Cir. 1984); Brown v. Marsh, 729 F. Supp. 864 (D.D.C. 1988); Brown v. United States, 5 Cl. Ct. I (1984); Brown v. Dep't of Army, 13 M.S.P.R. 635 (1982).

[4] During the proceeding before the Tax Court the parties stipulated that Mr. Brown in fact did not receive this sum. Brown v. Comem'r, 74 T.C.M. (CCH) 1449, 1451-54 (1997).

VII damages, and interest on certain payments. On May 12, 1995, the IRS issued Mr. Brown a notice of deficiency regarding his 1990 and 1991 taxes. The following month, Mr. Brown filed a petition in the United States Tax Court contesting his tax liability and the IRS notice of deficiency. Accordingly, the Court of Federal Claims issued an opinion on February 22, 1996, that Mr. Brown's filing of a petition in the Tax Court to contest the notice of deficiency divested the Court of Federal Claims of jurisdiction over Mr. Brown's tax claims pursuant to 26 U.S.C. § 7422(e) (1994). Brown, Nos. 94-227C & 94-358C, slip op. at 5-6. This court summarily affirmed. Brown v. United States, 95 F.3d 1165 (Fed. Cir. 1996).

Mr. Brown proceeded to litigate his case before the Tax Court. The Tax Court held that it possessed jurisdiction over Mr. Brown's tax liability. Brown v. Comm'r, 71 T.C.M. (CCH) 2301, 2303-04 (1996). The Tax Court further held, inter, alia, that: (1) Mr. Brown's back pay was taxable; (2) the IRS filed Mr. Brown's notice of deficiency within the statutory time period; and (3) the IRS' issuance of a refund for 1990 did not estop the IRS from later asserting a deficiency for that year. Brown v. Comm'r, 74 T.C.M. (CCH) 1449, 1451-54 (1997). The Sixth Circuit affirmed the Tax Court. Brown v. Comm'r, No. 98-1444, 1999 WL 283903 (6th Cir. 1999).

On June 25, 1999, Mr. Brown petitioned the Court of Federal Claims, under the Rules of the Court of Federal Claims 60(b) (RCFC 60(b))[2], for relief from the Court of

---

[2] Which is the equivalent of Fed. R. Civ. P. 60(b).

Federal Claims' 1996 judgment that it lacked jurisdiction over Mr. Brown's claims. The Court of Federal Claims found Mr. Brown's petition untimely. Brown I, slip op. at 4-5. The Court of Federal Claims further held that, even if Mr. Brown had timely filed his petition, the Court of Federal Claims lacked jurisdiction to address the merits of his claims. Id. at 5-6.

II.

Relief from a judgment is considered extraordinary and is only granted in exceptional circumstances. Calderon v. Thompson, 523 U.S. 538 (1998); 16 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3938, at 716-17, n.14 (1996). This court reviews the Court of Federal Claims' decision of whether to set aside a judgment under RCFC 60(b) for abuse of discretion. Matos v. Dep't of Health & Human Ser., 35 F.3d 1549, 1551-52 (Fed. Cir. 1994). RCFC 60(b) provides that relief may only be granted in certain circumstances, specifically "(1) mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial . . . (3) fraud . . . misrepresentation, or other misconduct of an adverse party . . . (6) any other reason justifying relief from the operation of the judgment."

In his petition to the Court of Federal Claims, Mr. Brown averred that his claim was grounded in RCFC 60(b)(6). Mr. Brown's petition alleged, specifically, that the Government fraudulently induced the Court of Federal Claims into entering a judgment in the government's favor. The Court of Federal Claims held that Mr. Brown's complaint, therefore, was grounded in RCFC 60(b)(3).

RCFC 60(b) provides that any motion for relief from a final judgment "shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken." Mr. Brown petitioned the Court of Federal Claims for relief from judgment approximately three and a half years after the Court of Federal Claims originally dismissed his complaint, and almost three years after this court affirmed the Court of Federal Claims' dismissal. Having found that Mr. Brown's complaint was grounded in RCFC 60(b)(3) and, therefore, that Mr. Brown was required to petition for relief within one year after final judgment, the Court of Federal Claims dismissed Mr. Brown's petition as untimely.

On appeal, Mr. Brown again contends that his complaint is grounded in RCFC 60(b)(6) and that his petition is not time barred. In particular, Mr. Brown states that his complaint is grounded in the fact that the statutory notice of deficiency issued to him by the IRS was fraudulent. This fraudulent notice, argues Mr. Brown, was the reason the Court of Federal Claims dismissed his 1996 complaint for lack of jurisdiction. According to Mr. Brown, his petition for relief from judgment, therefore, comes from a claim of "illegal exaction" under the Tucker Act and is only cognizable under RCFC 60(b)(6). The Court of Federal Claims has established that "the catch-all exception of subsection (6) is not available unless the asserted grounds for relief are not recognized in clauses (1) through (5)." Freeman v. Sec'y of DHHS, 35 Fed. Cl. 280, 283 (1996). This court has held that Fed. R. Civ. P. 60(b) contains two separate fraud provisions: (1) the fraud provision of subsection (3) referring to fraud committed by the opposing party; and (2) the general savings provision of subsection (6) referring to alleged fraud upon the court. Broyhill Furniture Indus., Inc. v.

Craftmaster Furniture Corp., 12 F.3d 1080, 1085 (Fed. Cir. 1993). This court has further held that "the savings clause of Rule 60(b) should be construed very narrowly" because otherwise the "nebulous concept of fraud on the court could easily overwhelm the specific fraud limitation provision of 60(b)(3)." Id.

In the present case, Mr. Brown asserts that the notice of deficiency that the IRS issued him was fraudulent. Any such potential fraud by the IRS was, therefore, upon Mr. Brown and not upon the Court of Federal Claims. Furthermore, the Court of Federal Claims did not dismiss Mr. Brown's claim simply because the IRS issued Mr. Brown a notice of deficiency. Mr. Brown's complaint was dismissed because Mr. Brown filed a petition with the Tax Court to contest the IRS notice of deficiency. Brown's filing with the Tax Court that deprived the Court of Federal jurisdiction over Mr. Brown's tax liability claim. See 26 U.S.C. § 7422(e). Clearly, Mr. Brown's claim of fraud must fall under RCFC 60(b)(3). The Court of Federal Claims, therefore, did not err in finding Mr. Brown's petition time barred.

Because Mr. Brown's petition was untimely filed, this court will not address the merits of Mr. Brown's claim.[1] Accordingly, this court affirms the Court of Federal Claims decision to dismiss Mr. Brown's petition for relief from judgment.

---

[1] In the present appeal, Mr. Brown makes the same allegations that both the United States Court of Federal Claims and this court considered and rejected in 1996 and 1997 respectively.

United States Court of Appeals for the Federal Circuit

00-5017

JAMES E. BROWN, Plaintiff-Appellant,

v.

UNITED STATES, Defendant-Appellee.

ORDER

Before RADER, Circuit Judge, SCHALL, Circuit Judge, and . BRYSON, Circuit Judge.

A petition for rehearing having been filed by the APPELLANT,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on January 26, 2001 unless another time becomes appropriate under Rule 41.

FOR THE COURT
s/Jan Horbaly
Jan Horbaly
Clerk

Dated: January 4, 2001